

The circuit court rightly judged that the cars in question were subject to the tax imposed by the statute of Louisiana, where that tax had been assessed on it, because such a tax the state could impose. The court also rightly judged that the cars in question were not subject to the tax attempted to be assessed on them, because the law of Louisiana did not charge such property so engaged with the tax attempted to be assessed on it. It was the duty of the appellee, or of the railroad companies having these cars under contract, to make the due return thereof under the state law to the assessors. There seems to have been, and to still be, some question between the appellee and the railroad companies to which its cars are let as to whether the appellee or the railroad companies should make the return of this property, and pay the taxes due thereon, in the state of Louisiana. But that is a question in which the state of Louisiana, the parish of Orleans, and the city of New Orleans have no vital interest. The property is liable without regard to who makes, or fails to make, the return. It possibly explains why the return was not made. The assessors cannot impose, as a penalty for such failure, the assessment of such property as other personal property permanently located in the state, because no such penalty is denounced by the statute. The statute provides that such failure shall deprive the party whose duty it is to make the return of any standing in court to correct a wrong description, whether in name, measurement, or otherwise, unless written complaint is made within certain specified time. It puts a limitation of time on the right of parties to be heard concerning the description of the property listed, and the valuation of the same as assessed, and on the right of testing the correctness of their assessments before the proper courts of justice. The circuit court held correctly that these provisions for applying to the committee of assessments, and of testing assessments by suit, have relation to matters of description and valuation. Here these are not questioned. Both are correct. The liability to the tax sought to be imposed by the appellants without warrant of law is what the appellee seeks to avoid. It is entitled to the protection it asks.

The judgment of the circuit court is therefore affirmed.

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SAVANNAH FIRE & MARINE INS. CO. v. PELZER MANUF'G CO. et al.

(Circuit Court, D. South Carolina. February 26, 1894.)

1. SUBROGATION—COVENANT IN LEASE.

A warehouse was built on leased ground belonging to a railroad company, and the warehouseman covenanted in the lease that, for any damage to house or contents by fire caused by the railroad company, the company should not be liable unless such fire was due to its negligence. *Held*, that, though Gen. St. S. C. § 1511, makes railroad companies liable for fires set by them, without regard to the question of negligence, this covenant is binding on the insurer, who is subrogated to the rights of the warehouseman.

2. RAILROAD COMPANIES—FIRES—NEGLIGENCE—EVIDENCE.

The fact that the fire occurred immediately after the passage of a locomotive to and fro alongside the warehouse is not sufficient to show

negligence on the part of the railway company, where there is evidence that the company used all reasonable precautions to prevent fires, and that its locomotive was equipped with all proper appliances generally found effective to prevent the escape of sparks.

**In Equity.** Bill by the Savannah Fire & Marine Insurance Company against the Pelzer Manufacturing Company, the Columbia & Greenville Railroad Company, and others. Bill dismissed.

Julius H. Heyward and Mitchell & Smith, for complainants.

Cothran, Wells, Ansel & Cothran, Smythe & Lee, Abney & Thomas, Haynsworth & Parker, and T. Q. & A. H. Donaldson, for defendants.

**SIMONTON, Circuit Judge.** The facts of this case, as developed in the record and testimony, are these: The Pelzer Manufacturing Company had on storage in the warehouse of Cely Bros., in Greenville, 1,000 bales of cotton, estimated to be of the value of \$45,000 and more. The rate of storage was 25 cents per bale, insured. Cely Bros. insured the cotton for nearly its full value in policies taken out in their own name in various companies of their own selection. The policies were concurrent, covering all the cotton in the warehouse, each policy being for a fixed amount. The warehouse was erected on lands of the Columbia & Greenville Railroad Company, upon or next adjacent to their right of way. The land was held by Cely Bros. under lease for the term of 20 years from the railroad company at a nominal rent. This covenant was inserted in the lease, and was a part of the consideration thereof:

"And it is further covenanted and agreed, by and between the parties hereto, that during the continuance of this lease the Columbia and Greenville Railroad Company, its successors and assigns, shall not in any wise be responsible, for any loss or damage to the said building, or the contents thereof, from fire communicated by the locomotive engines of the said company, its successors or assigns, or originating within the limits of the right of way of the said Columbia and Greenville Railroad Company, its successors or assigns; and all such loss or damage shall be borne by the said Cely Brothers, their executors, administrators, and assigns."

This lease was dated 15th December, 1882. Adjacent to the warehouse, which was filled with the cotton of the Pelzer Manufacturing Company, was a platform extending towards, and almost up to, the track of the Columbia & Greenville Railroad Company. On this platform, at the time of the fire hereinafter mentioned, were a number of bales of cotton, the property of other persons than the Pelzer Manufacturing Company. On 15th March, 1889, before noon, while a locomotive of this railroad company was passing to and fro on the track of the railroad, and alongside this platform, a fire broke out in the cotton on the platform. This fire was thereby communicated to the cotton in the warehouse, and consumed all the bales therein and on the platform. Very shortly after the fire, Cely Bros. assigned all the policies held by them, covering cotton in the warehouse, to the Pelzer Manufacturing Company, who at once notified each insurance company of this fact,

made proofs of loss, and demanded payment. Three of these insurance companies—the Springfield Fire & Marine Insurance Company, the Rochester German Insurance Company, and the Continental Insurance Company—paid the losses on demand, and each of them obtained an assignment to the amount of the payment made by each of them, respectively, of that much of the claim which the Pelzer Manufacturing Company might have against the railroad company because of the loss by fire. The other companies, among them the complainant in this suit, resisted payment, chiefly upon the ground that Cely Bros., in whose name the policies were issued, had released the railroad company from a claim for damages, and had concealed this fact when the insurance was effected. After protracted litigation the decisions were adverse to the insurance companies, and each of them has paid its share of the loss. The Savannah Fire & Marine Insurance Company, one of the litigating companies, now files this bill of complaint, in behalf of itself and all other insurance companies in like plight, averring that the Pelzer Manufacturing Company, as owner of the cotton, has a claim for damages against the railroad company by reason of its destruction under the circumstances stated, and that each of them is entitled to subrogation, pro tanto, on payment of loss, to these rights; and that, inasmuch as the tort is indivisible, this claim of damages must be made in the name of the Pelzer Manufacturing Company for the use of the insurance companies. The bill prays that an account be taken of the number of bales of cotton covered by the policies of insurance and the value thereof, and that the Columbia & Greenville Railroad Company be required to pay the same; that the same, when paid, be distributed among the parties entitled thereto, according to their respective rights and interests; and for general relief. To this bill the Columbia & Greenville Railroad Company, and its lessee, the Richmond & Danville Railroad Company, the Pelzer Manufacturing Company, two of the insurance companies who have paid, and Cely Bros. are defendants and have answered.

The position of the complainant is this: Cely Bros. were either the insurers of the cotton to the Pelzer Manufacturing Company, and so protected themselves by reinsuring in these several insurance companies, or they effected the several policies of insurance as agents of the Pelzer Manufacturing Company in that behalf, and for its use and benefit. If they were insurers, then, upon payment of the loss, they became subrogated to any rights the Pelzer Manufacturing Company may have against the railroad company; and, inasmuch as the actual payment was made by these companies, they, in turn, became subrogated to all the rights of Cely Bros., and, through them, to the rights of the Pelzer Manufacturing Company. If Cely Bros., in effecting the policies, acted as agents for and in behalf of the Pelzer Manufacturing Company, then the insurance companies paying the loss become subrogated directly to the rights of the Pelzer Manufacturing Company. The answer of the railroad companies to this contention is that if Cely Bros. were the insurers, and the complainant and the other insur-

ance companies their reinsurers, and so work out their subrogation through Cely Bros., they are bound by the release and covenant executed by Cely Bros. to the railroad company, above set out; or, if Cely Bros., by authority of the Pelzer Company, in their own name effected these policies for the Pelzer Company, they, and their principals through them, had full notice and knowledge of this release, and are bound by it. This is met by the complainant with this contention: The release in question was directed to and released the liability imposed on railroad companies by section 1511, Gen. St. S. C., holding them responsible for the destruction of property by fire communicated from the locomotive on, or originating on, the right of way, without regard to the question of negligence; and that it does not cover the destruction of property by fire on or adjacent to the right of way, occasioned by the negligence of the company, its officers and agents; that the language of the release, being in the words of the statute, shows this, and that, were it otherwise, a release of the railroad company from the consequences of its own negligence is against public policy, and void. Subrogation puts the person subrogated in the shoes of him to whom he is subrogated, and gives him the same rights,—neither more nor less. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 321, 6 Sup. Ct. 750, 1176. The insurance companies paid these losses to the assignees of Cely Bros., the persons they insured. They have all the rights Cely Bros. had, or would have had,—no more and no less. It must be borne in mind that we are not discussing the liability of the railroad company as a common carrier. It never, in any sense, had the cotton which was stored in the warehouse in its care, custody, possession, or control. Indeed, the testimony shows that there never was any design to ship it on this railroad. When the president of the company at one time entertained the design of moving it, he provided drays or wagons for this purpose. So, the bare fact of the destruction by fire of this cotton does not involve a responsibility upon the railroad company from which it cannot be freed unless it be shown that the fire was occasioned by the act of God or the public enemy. In the circumstances of this case, negligence on the part of the railroad company must appear, and it cannot be held responsible if no negligence is made to appear. *McCready v. Railroad Co.*, 2 Strob. 359. Indeed, this is the reason and the excuse for the drastic provisions of section 1511, Gen. St. Assuming, therefore, for the purposes of this case, the position taken by complainant,—that while the release binds Cely Bros. from such damages as are included in section 1511, Id., and that public policy would avoid it if it guarded against the results of negligence on the part of the company,—does such negligence appear in this case? A careful examination of the testimony shows that no direct and positive evidence has been adduced explaining, beyond question, the origin of this fire. The coincidence of the passage of the locomotive to and fro alongside of the platform filled with cotton and the outbreak of the fire leads to the conclusion, as an inference, that the fire may—perhaps must—have been started by a spark from the locomotive;

and we may assume that this is the case. But, on the other hand, the testimony shows that every care and precaution was taken by the railroad company to prevent such an occurrence; care and precaution taken but a short time—not many minutes—preceding the disaster. All the proper appliances generally found effective in preventing sparks from flying were actually in use and in good order. If the fire did so originate, it was not from the want of care; that is to say, was not the result of negligence. As we have seen, the railroad company, not occupying the relation of common carrier to this cotton, was not its insurer against all accidents. What was the degree of care it should have exercised is not clearly established in the books. Judge Wallace, on circuit, in an obiter dictum, seems to think that the rule in *Danner's Case*, 4 Rich. Law, 329, will be applied to all cases of injuries from railroad companies, (*Gregory v. Layton*, 36 S. C. 94, 15 S. E. 352;) but even then he holds that only the burden of proof is shifted, and that negligence could be disproved. Be this as it may, if, considering the circumstances of this case, and the great danger, from the hot furnace and fire of the locomotive, to cotton on the platform, we hold the company to extreme care,—*summa diligentia*,—the testimony for the defendant establishes that this was exercised. Nothing from the evidence on the part of the complainant disproves it. Under the rigid rule of *Danner's Case*, this would exonerate the railroad company. Let an order be taken dismissing the bill, each party paying his own costs; the complainant to pay the costs of the officers of the court; the stenographer's fees to be equally divided among all the parties.

NOTE. Although it has been assumed, for the purposes of this case, that one cannot contract for a release of his own negligence or that of his agents or servants, it must be noted that this rule is not universal. Even a common carrier can insure itself against the negligence of itself, its servants and agents. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 320, 6 Sup. Ct. 750, 1176.

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### ROME R. CO. v. RICHMOND & D. R. CO.

(Circuit Court, N. D. Georgia. February 14, 1894.)

#### 1. GARNISHMENT—DISSOLUTION—GARNISHEE'S ANSWER—COSTS.

Code Ga. § 3549, provides that the expense incurred by a garnishee shall be taxed in the costs in the principal suit, when the garnishee shall answer truly "as now required by law, and shall pay the sum due to the defendant into court, or shall turn over any personal property of the defendant that he may have, or shall answer truly that he owes the defendant nothing." Act. Ga. Oct. 15, 1885, (Laws 1884-85, p. 96,) provides that the garnishment may be dissolved by giving a bond conditioned to pay the judgment rendered on the garnishment, but it required the garnishee to answer notwithstanding the dissolution of the garnishment. *Held*, that a garnishee answering truly is entitled to the costs of his answer, where the garnishment is dissolved, so that no money is paid into court, or property turned over.

#### 2. GARNISHMENT IN SUIT COMMENCED BY ATTACHMENT.

Act Ga. Oct. 15, 1885, entitled "An act to amend the garnishment laws of this state," and providing a method for the distribution of garnishments, has reference only to garnishment at common law, which is pro-

vided for by Code Ga. §§ 3532 et seq., and does not apply to garnishment by attachment, which is provided for elsewhere in the attachment laws of the state.

**8. SAME—ANSWER AT DEFENDANT'S REQUEST—COSTS.**

But when the garnishee in a suit commenced by attachment answers in accordance with the requirements of the act of October 15, 1885, at the request and by the direction of defendant's attorney, defendant is estopped to deny his right to have the expense of his answer taxed in the costs.

**At Law.** On motion to tax costs. Action by the Rome Railroad Company against the Richmond & Danville Railroad Company, (the Georgia Railroad & Banking Company and the Georgia Railroad, garnishees.) Motion granted.

Brooks & Turnbull, for plaintiff.

Jackson & Leftwish, for defendant.

**NEWMAN**, District Judge. Attachments were sued out against the Richmond & Danville Railroad Company, a foreign corporation, in suits brought against it, and summons of garnishment were served on the Georgia Railroad & Banking Company and the Georgia Railroad, lessee. Defendant filed answers acknowledging indebtedness; the answer being in accordance with the terms of the act of the legislature of Georgia of October, 1885, which will be hereafter discussed. The questions raised in this matter involve the construction of the statutes of the state of Georgia in reference to the right of garnishees to have their expenses for making answers taxed as costs in the case in which garnishment is issued. There were, up to October, 1885, provisions in the statute by which garnishment might be dissolved by defendant, by giving bond in the terms of the statute; and thereby the garnishee was relieved from all further liability with reference to the garnishment, and no answer of any kind was required to be filed. By the terms of the act alluded to, approved October 15, 1885, provision is made for the dissolution of garnishments by the giving of bond conditioned for the payment of the judgments that should be rendered on the garnishment, instead of bonds conditioned for the payment of the amount which might be recovered in the principal suit, or the amount due on the judgment, accordingly as the garnishment was sued out pending suit or after judgment was obtained, as had been theretofore the law in Georgia. This statute of 1885 further provides (see Laws Ga. 1884-85, p. 96) that:

"The garnishee shall file his answer stating what amount he was indebted to defendant or what effects he had in his hands belonging to the defendant at the time of the service of such summons, and what he had become indebted to the defendant, or what effects had come into his hands belonging to the defendant, between the time of the service of such summons and the making of his answer, and in the event the court shall decide that the fund or property in the hands of the garnishee were subject to garnishment, had the garnishment not been dissolved, then the court shall render judgment against the defendant and his securities."

The difference between the old and new law being that under the old law the bond to dissolve was conditioned to pay the debt

which might be found to be due to the plaintiff by the defendant, and by the act of 1885 the bond is conditioned to pay the amount that might ultimately be determined to be in the hands of the garnishee, or be due by him to the defendant; the act providing, further, that the garnishee should be required to answer the garnishment, this latter provision being rendered necessary in order to ascertain the extent of liability on the bond. In this case, notwithstanding the fact that the garnishment was dissolved, the garnishee filed answer, being advised by counsel that it was necessary to do so under the provisions of the act of the legislature just alluded to. The provision of the Code of Georgia (section 3549) with reference to the right of garnishees to have costs is as follows:

"In all cases where process of garnishment shall be served upon any person, and such person shall make a true answer to the garnishment, as now required by law, and shall pay the sum due to the defendant, into the court, or shall turn over and deliver up any personal property of the defendant's that may have been in his possession, as required by law, or shall answer truly that he owes the defendant nothing, if the garnishee shall have to incur any expense in making his or her answer to the garnishment, or in turning over said personal property, the amount so incurred, shall be taxed in the bill of costs, under the approval of the court, and be paid, by the party cast in the suit, as other costs are now paid."

It is claimed that under this section, there are now but three cases in which a garnishee may have taxed in the costs of his expenses in answering, namely: First, where the garnishee makes a true answer as now required by law, and shall pay the sum due to the defendant into the court; second, where like answer is made, and the garnishee shall turn over or deliver up any personal property of the defendant that he may have in his possession, as required by law; and, third, where the garnishee answers truly that he owes the defendant nothing. At the time of the passage of this act, (1873,) one or the other of these three things it was the duty of the garnishee to do; and it is as if there had been a proviso to the statute that a garnishee should have his expenses for answering a garnishment, provided he did his duty in the premises. The allowance to him is for the expense of filing his answer, and the qualification or condition is that he himself complies with the law. It is not for bringing the sum due to the defendant into court, or for turning over and delivering up any personal property of the defendant, or for telling the truth in case the garnishee claims to owe nothing, that the allowance is made to him by the statute, but it is for the expense of filing his answer; and this expression in the statute, which, it is claimed, embraces the only cases of the garnishee's right to have his expenses allowed, is nothing more than a requirement that the garnishee must himself have complied with the law and its terms, as it then stood, before he could ask aid of the court to reimburse him for his outlay in answering. Now, the act of 1885 was passed, and by the terms of that act the garnishee was required to answer, notwithstanding the fact that the garnishment had been dissolved; and if he answered that he owed the defendant, as in the case now before the court, the effect of the answer was simply

to enable the parties to determine the amount due on the garnishment, and which the bond to dissolve was conditioned to pay. The garnishee could not pay the money due into court, because, when the garnishment was dissolved, he had, presumably, already paid the money over to the defendant. The garnishee having been required by the terms of this last act to answer, notwithstanding the fact that the garnishment had been dissolved, and he had paid over whatever he owed to the defendant, can the garnishee have the expenses for answering allowed, under the term of the section of the Code of Georgia above discussed? If the above construction of the connecting section of the Code of Georgia is correct, it seems entirely clear that he can. The allowance to him is for any expenses he may have incurred in making his answer to the garnishment; and when, by subsequent statute, the garnishee is required to answer in a manner and under circumstances not then provided for, it seems that the terms of the statute should apply to him, as much as to one who had been originally covered by it.

The next question raised here is that the act of 1885, by its terms, does not apply to garnishments by attachment. By the Code of Georgia, which was adopted in 1862, section 3532 provides, "In case where suit is pending or where judgment has been obtained, the plaintiff shall be entitled to process of garnishment in the following regulation;" and then follows the method of suing out garnishments. This is garnishment at common law. Garnishment at common law, it was provided by the Code, (section 3540,) might be dissolved, as has been stated, by giving bond for the payment of the amount due on the judgment, or which might be recovered in the action. By an act of March 4, 1869, it was provided that:

"From and after the passage of this act, in all cases where summons of garnishment has issued by attachment and served as now provided by law regulating attachments, said garnishments may be dissolved as if same had been at common law, any law or usage to the contrary notwithstanding."

The act of 1885, by its terms, very clearly applies to garnishments at common law. The language is that:

"From and after the passage of this act in any case now pending or hereafter brought, when garnishments have been or are issued when suit is pending or judgment has been obtained, the defendant may dissolve such garnishment upon filing in the clerk's office of the court where suit is pending or judgment was obtained," etc.

The similarity of the language here used, and the language of section 3532 of the Code in reference to garnishment at common law, is apparent. But it is claimed that, the act of 1869 having placed garnishments by attachments upon the same footing, as to the method in which they might be dissolved, with garnishments at common law, that this act of 1885 also embraces and applies to garnishments by attachment. That the act of 1869 had the effect claimed, up to the time of the passage of the act of 1885, may be conceded, but it is entirely clear that the intention of the legislature was to confine this act of 1885 to garnishments at com-



mon law. Garnishments by attachment and garnishments at common law, as to the method of dissolution, stood upon the same footing, at the time of the passage of this act of 1885; and yet the legislature, with this knowledge, confines the effect of this act, which clearly applies it by its terms, to garnishments at common law. It is entitled "An act to amend the garnishment laws of this state;" and garnishments by attachment are part of the attachment laws of the state,—a different chapter and series of laws, entirely, in the Code. It applies to cases when suit is pending or judgment has been obtained,—the identical language of the Code, as applied to garnishment at common law. It seems impossible that the legislature, with the knowledge of what the law was then, which it must have had, would have used the terms it did, if it had intended to embrace garnishments other than those at common law. In addition to this, very strong reasons can be seen why the legislature would have passed this act in reference to garnishments at common law, and not with reference to garnishments by attachment, or, rather, to express it more clearly, to attachments by garnishment. Attachments are issued for extraordinary reasons,—for nonresidents, for removal of person or property, absconding, and fraud, and it is not at all unreasonable to conclude that the legislature would not allow a defendant who had placed himself in a position to justify an attachment against him to dissolve the garnishment by simply giving a bond for the amount that might be found to be due on the garnishment. But it would be entirely unreasonable to believe that it would leave such a defendant in the position he was under the old law, namely, to give bond for the eventual condemnation money.

One other question is raised under section 3320 of the Code of Georgia, in reference to attachments against foreign corporations. The section is as follows:

"When an attachment shall be levied on the property of an incorporation not incorporated by the laws of this state, it shall be lawful for any agent of such incorporation to relieve the property levied on, or discharge the summons of garnishment that may issue, by giving bond to the levying officer, conditioned to pay the amount that may be recovered in said case; which bond the levying officer shall return to the court to which the attachment is made returnable, and judgment may be entered up in like manner against the principal and security upon said bond for the amount the plaintiff may recover against such corporation."

It is claimed that this being a distinct and separate provision of the statutes in reference to foreign corporations, and the method by which they may dissolve garnishments, in any view that might be taken of the matter, on the line just discussed, it would not apply to garnishment in attachments against foreign corporations. It is unnecessary to discuss this, in the view that has been taken of the act of 1885; because, if it does not embrace attachments at all, of course it does not embrace attachments against foreign corporations; and it would be a waste of time to consider, if it applied to garnishments by attachments generally, whether, in view of this special statute as to foreign corporations, it had the effect of changing or modifying it as to the method of dissolving garnishments.

The views of the court have thus been given upon all the phases of this matter, as it is said there are many cases in which the question will be raised. The case now before the court, and the other cases which have been argued in connection with it, and any other similar cases, will be controlled by the following propositions:

1. Answers in suit at common law, where garnishments are taken out and answers filed under the terms of the act of 1885, the garnishee is entitled to his expenses of answering.

2. Where suits were commenced by attachment, and answers were filed by the garnishee in accordance with the provisions of the act of 1885, at the request and by the direction of the counsel for the defendant, the defendant is estopped from denying the right of the garnishee to have the expenses of answering, especially as it was a new question, and a garnishee might well be in doubt as to his duty in the matter.

3. Where suits were commenced by attachments, and answers were filed under the terms of the act of 1885, and no such directions or requests were made by the counsel for the defendant, the garnishee is not entitled to his expense for answering the garnishment.

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KIRCHER v. MURRAY et al.

(Circuit Court of Appeals, Fifth Circuit. February 13, 1894.)

No. 173.

1. DESCENT AND DISTRIBUTION—WHO ARE HEIRS—SPANISH LAW.

Under the Spanish laws in force in Texas in 1836, a wife could not be heir to her husband, and under no circumstances could succeed to his separate property, except to the marital one-fourth, when necessary as relief against poverty. 54 Fed. 617, affirmed.

2. TEXAS BOUNTY LANDS—CERTIFICATE—EQUITABLE INTEREST—PATENT—COMMUNITY PROPERTY.

The right of one who held a certificate from the state of Texas, under the act of February 15, 1853, for bounty lands for service in the army in 1835-36, was an equitable right, as was also the right of his widow, after his death, to one-half thereof as community property; and, on the subsequent issuance of a patent in his name, the legal title, by force of Rev. St. Tex. art. 3961, became vested in his heirs, and, as the widow was not an heir, her interest remained an equitable interest, which she could not enforce by action at law in a federal court. 54 Fed. 617, affirmed.

Error to the Circuit Court of the United States for the Western District of Texas.

Augusta Kircher filed this suit on the 10th of September, 1891, against R. G. Murray and five others, to recover title and possession from them of 433 acres of land described in her original petition. On the 12th of February, 1892, R. G. Murray and his codefendants answered, setting up fully the claims of plaintiff and defendants, and contending that under the facts, as pleaded, defendants were entitled to judgment. The facts being uncontroverted, the plaintiff, by demurrer and special exceptions, raised the issues in the case as to the legal effect of the given facts. The court, having heard the parties upon the issues raised, gave its written opinion sustaining the defendants' contention, and, a jury being waived, rendered judgment in the case conformable to its opinion. 54 Fed. 617. The plaintiff, in